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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE,
AS ADMINISTRATRIX OF THE ESTATE
OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. IN ORDER TO STATE A CLAIM UNDER SECTION 504, AN EMPLOYEE MUST SHOW THAT HE IS A PARTICIPANT IN A PROGRAM IN WHICH HE IS AN INTENDED BENEFICIARY OF FEDERAL FINANCIAL ASSISTANCE	3
A. Title VI of the 1964 Civil Rights Act, Not Title IX of the 1972 Education Amendments, Served As the Source of the Meaning and Scope of Section 504 At the Time It Was Enacted	4
B. The Legislative History of Section 601 of Title VI, From Which Section 504 Was Derived, Shows That Even Without Section 604's Language Limiting the Employment-Related Scope of Title VI, Section 601 Did Not Encompass Employees Unless They Were the Intended Beneficiaries of Financial Assistance	7
C. Section 504 is Program Specific and, Therefore, Protects Only the Intended Beneficiaries of Federal Funded Programs from Discrimination	11
II. SECTION 504 DOES NOT CREATE AN ADDITIONAL PRIVATE RIGHT OF ACTION BEYOND THE RIGHT TO SEEK JUDICIAL REVIEW OF AN ADVERSE AGENCY ACTION	16

TABLE OF CONTENTS—Continued

Page

A. The Legislative History of the Rehabilitation Act of 1973 and Its Two Amendments Does Not Support an Implication of a Right of Action Under Section 504 for Private Individuals Against Recipients of Federal Funds Prior to an Administrative Determination.... 16

1. The 1974 Amendments 17

2. The 1978 Amendments 20

B. Implication of a Private Right of Action Under Section 504 Would Interfere With the Legislative Purpose of the Rehabilitation Act 24

III. A PLAINTIFF-EMPLOYEE HAS NO STANDING TO SUE UNDER SECTION 504 UNLESS HE IS AN INTENDED BENEFICIARY OF OR A PARTICIPANT IN A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE AND HAS EXHAUSTED AVAILABLE ADMINISTRATIVE REMEDIES 28

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 3a

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 24
Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947) 25, 29
Ass'n Against Discrimination v. City of Bridgeport, 647 F.2d 257 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1611 (1982) 10
Bd. of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) 14, 15
Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619 (9th Cir. 1982) 25
Brown v. GSA, 425 U.S. 820 (1976) 24
Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) 11
Cain v. Archdiocese of Kansas City, 508 F. Supp. 1021 (D. Kan. 1981) 12
California v. Sierra Club, 101 S. Ct. 1775 (1981) .. 16
Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 101 S. Ct. 1830 (1981) 17
Camp v. Pitts, 411 U.S. 138 (1973) 20
Cannon v. University of Chicago, 441 U.S. 677 (1979) 2, 8, 16, 22, 23
Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980) 10, 12, 15
Cave v. Beame, 433 F. Supp. 172 (E.D. N.Y. 1977) .. 28
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 20
Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977) 29
Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) 28
Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978) 17
Doe v. New York University, 442 F. Supp. 522 (S.D.N.Y. 1978) 28, 29
Dupree v. City of Chattanooga, 362 F. Supp. 1136 (E.D. Tenn. 1973) 28

TABLE OF AUTHORITIES—Continued

Page

E. E. Black v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980) 25
Federal Maritime Board v. Ibrandtsen, 356 U.S. 481 (1958) 29
Feliciana v. Romney, 363 F. Supp. 656 (S.D.N.Y. 1973) 28
Flora v. Moore, 461 F. Supp. 1104 (N.D. Miss. 1978) 12
Green v. Cauthen, 379 F. Supp. 361 (D.S.C. 1974) 28
Green Street Association v. Daley, 373 F.2d 1 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967) 28
Guardians v. Civil Service Commission, No. 81-431 (U.S. S. Ct. 1982) 2
Johnson v. County of Chester, 413 F. Supp. 1299 (E.D. Pa. 1976) 28
Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) 17
Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) 17
LeMaster v. Weinberger, 533 F.2d 337 (6th Cir. 1976) 26
Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) 3, 17, 18, 19, 20, 22, 27
McGee v. United States, 402 U.S. 479 (1971) 29
McKart v. United States, 395 U.S. 185 (1969) 29
Morris v. Gressette, 432 U.S. 491 (1977) 24
N.A.A.C.P. v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979) 17
National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 (1974) 22, 24
Neal v. U.S. Postal Service, 468 F. Supp. 958 (D. Utah 1979) 28
North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912 (1982) 2, 4
Reynolds v. Ross, 25 FEP Cases 462 (N.D.N.Y. 1981) 12

TABLE OF AUTHORITIES—Continued

Page

Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977) 24, 27, 29
Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 246 (1980) 21, 22
Sabol v. Board of Education, 510 F. Supp. 892 (D.N.J. 1981) 12
Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982) 10
School District of City of Saginaw, Michigan v. HEW, 431 F. Supp. 147 (E.D. Mich. 1977) 28
Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) 3, 4, 7, 10, 11, 12, 15, 18, 22, 27
Southeastern Community College v. Davis, 422 U.S. 397 (1979) 2, 23
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 16, 21
Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979) 2, 10, 27
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 16, 22
United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977) 17
United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981) 10
United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 29
University of California Regents v. Bakke, 438 U.S. 265 (1978) 19
University of Texas v. Camenisch, 101 S. Ct. 1830 (1981) 2
Weinberger v. Salfi, 422 U.S. 749 (1975) 29

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1977) 21
Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d *et seq.* ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Section 601, 42 U.S.C. § 2000d 7, 8, 10, 12, 13, 18
Section 602, 42 U.S.C. § 2000d-1 .....9, 10, 14
Section 603, 42 U.S.C. § 2000d-2 ..... 22, 28
Section 604, 42 U.S.C. § 2000d-3 .....5, 6, 8, 9, 10
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* 23, 24, 27, 1a
Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 23
Education Amendments of 1972, Title IX, 20 U.S.C. § 1681 *et seq.* 4, 7, 18, 19, 20, 23, 25
Section 901, 20 U.S.C. § 1681 18
Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.* .....*passim*
Section 501, 29 U.S.C. § 791 23
Section 503, 29 U.S.C. § 793 ..... 17, 21
Section 504, 29 U.S.C. § 794 .....*passim*
Section 505, 29 U.S.C. § 794a 21, 22
Section 701, 29 U.S.C. § 701 21
Section 706(7), 29 U.S.C. § 706(7) 26, 3a

Legislative History:

H.R. 7152, 88th Cong., 1st Sess. (1963) 8, 9
H.R. 12,154, 92d Cong., 1st Sess. (1971) 6
H.R. 13,947, 92d Cong., 2d Sess. (1971) 6
H. Rep. No. 95-1780, Conf. Rep., 95th Cong., 2d Sess. (1978) 23
S. 1731, 88th Cong., 1st Sess. (1963) 8
S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076.... 16
S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974).... 18, 19
S. Rep. No. 95-890, 95th Cong., 2d Sess. (1978).... 22
Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, ser. 4, pt. II, 88th Cong. 1st Sess. 1543 (1963) 13
Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 8

TABLE OF AUTHORITIES—Continued

	Page
Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary, ser. 4, pt. IV, 88th Cong., 1st Sess. 2766 (1963)	13
Hearings on H. Res. 789 Before the House Comm. on Rules, 88th Cong., 2d Sess. (1964)	8, 9
Hearings on H.R. 7152 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1964)	8, 13
Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. (1964)	8
Hearings on H. Res. 789 Before the House Committee on Rules, 88th Cong., 2d Sess. (1964)	10, 14
110 Cong. Rec. 1518 (1964)	8, 12
110 Cong. Rec. 1519 (1964)	8, 12
110 Cong. Rec. 1521 (1964)	12
110 Cong. Rec. 1542 (1964)	12
110 Cong. Rec. 1602 (1964)	8
110 Cong. Rec. 2480 (1964)	12
110 Cong. Rec. 2484 (1964)	9
110 Cong. Rec. 6545 (1964)	12
110 Cong. Rec. 7059 (1964)	14
110 Cong. Rec. 7060 (1964)	12
110 Cong. Rec. 7067 (1964)	14
110 Cong. Rec. 10,076 (1964)	8, 9
110 Cong. Rec. 12,689 (1964)	14
110 Cong. Rec. 12,707 (1964)	9
110 Cong. Rec. 12,714 (1964)	10, 14
110 Cong. Rec. 12,720 (1964)	10
117 Cong. Rec. 45,974 (1971)	6
118 Cong. Rec. 32,279 (1973)	17
118 Cong. Rec. 32,294 (1973)	12
118 Cong. Rec. 32,307 (1973)	12
118 Cong. Rec. 32,310 (1973)	6, 12
119 Cong. Rec. 18,137 (1973)	6
124 Cong. Rec. H12720 (daily ed. October 12, 1978)	23
124 Cong. Rec. S15590 (daily ed. September 20, 1978)	22
124 Cong. Rec. S15591 (daily ed. September 20, 1978)	22, 23

TABLE OF AUTHORITIES—Continued

	Page
124 Cong. Rec. S15593 (daily ed. September 20, 1978)	22, 23
124 Cong. Rec. S18999 (daily ed. October 14, 1978)	22
124 Cong. Rec. S19000 (daily ed. October 14, 1978)	22
124 Cong. Rec. S19001 (daily ed. October 14, 1978)	22
Regulations and orders:	
Executive Order 11,914, 41 Fed. Reg. 17,871 (April 28, 1976)	20
Executive Order 12,250, 45 Fed. Reg. 72,995 (November 4, 1980)	20
45 C.F.R. Parts 80 and 81	18
45 C.F.R. § 84.61	21
45 C.F.R. Part 86	18
41 Fed. Reg. 20,296	25, 29
45 Fed. Reg. 31,442	20
Miscellaneous:	
Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964)	29
Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L. J. 49 (1976)	12
Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 Harv. L. Rev. 833 (1976)	26

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioner.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors com-

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[1] Their consents have been filed with the Clerk of the Court.

posed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, EEAC's members have a direct interest in the issue presented in this case; *i.e.*, whether, to state a claim of employment discrimination under Section 504, a plaintiff-employee must show that he is a participant in a program in which he is the intended beneficiary of federal financial assistance and that he has exhausted administrative remedies.[2]

SUMMARY OF ARGUMENT

The legislative history of the Rehabilitation Act of 1973 and its two amendments shows that Title VI of the 1964 Civil Rights Act is the source of the meaning and scope of Section 504. Whether sought by a private plaintiff or a government agency, relief for employment discrimination is not available under Title VI or Section 504 unless the primary objective of the federal assistance received by the employer is to provide employment. *See, e.g., Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

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[2] Because of its interest in issues arising out of Section 504, EEAC filed briefs as Amicus Curiae in the Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *University of Texas v. Camenisch*, 101 S. Ct. 1830 (1981). EEAC has also filed briefs in the Court involving Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 in *Guardians v. Civil Service Commission*, No. 81-431 (1982); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982). An intepretation of the scope and legislative histories of those two statutes is relevant to the resolution of the issues in this case.

Furthermore, Congress did not create under Title VI, or intend to create under Section 504, a right of action for private individuals against recipients of federal financial assistance prior to an administrative determination. Thus, in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980), the Seventh Circuit stated that its decision in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), upon which other courts, including the Third Circuit, have relied to imply a private right of action under Section 504, was dependent upon the absence of a regulatory enforcement scheme. That enforcement scheme has since been instituted. Virtually every federal agency, including the Department of Transportation, now has in place administrative procedures for handling complaints of the nature presented here. In sum, in order for an otherwise qualified handicapped, plaintiff-employee to have standing under Section 504, the complainant must have been the intended beneficiary in a program receiving federal funds and have exhausted his administrative remedies.

ARGUMENT

I. IN ORDER TO STATE A CLAIM UNDER SECTION 504, AN EMPLOYEE MUST SHOW THAT HE IS A PARTICIPANT IN A PROGRAM IN WHICH HE IS AN INTENDED BENEFICIARY OF FEDERAL FINANCIAL ASSISTANCE.

When Congress enacted Section 504 of the Rehabilitation Act in 1973, Title VI of the 1964 Civil Rights Act served as the source of its jurisdictional scope. This scope was reaffirmed in 1978 when Congress amended the Act to provide that the "remedies, procedures and rights" of Title VI are applicable to employment. Thus, as under Title VI, in order for a plaintiff-employee to have standing under Section 504, the complainant must have been an intended beneficiary of a program receiving federal funds and have exhausted his administrative remedies.

A. Title VI of the 1964 Civil Rights Act, Not Title IX of the 1972 Education Amendments, Served As the Source of the Meaning and Scope of Section 504 At the Time It Was Enacted.

Although written broadly, Section 504, 29 U.S.C. § 794, addresses itself only to handicap discrimination against the participants and beneficiaries of federally assisted programs. The wording chosen by Congress, when read in conjunction with its legislative history, makes clear that Section 504 is designed to protect from handicap discrimination only those persons for whose benefit the federally funded programs are established. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1227 (7th Cir. 1980). It does not by its terms regulate the general employment practices of recipients in circumstances in which employees are not the intended beneficiaries of federal monies.

The Third Circuit erroneously concluded, however, that Section 504's legislative history supports the position that Section 504 prohibits employment discrimination against handicapped persons by federal grantees regardless of the nature and purpose of the federal assistance and irrespective of who are the intended beneficiaries of that assistance. The court erred in part because it misapplied this Court's analysis of a similarly worded provision in Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, prohibiting sex discrimination in programs receiving federal financial assistance. *See North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982). In doing so, the appellate court failed to recognize the differences in the legislative histories and structures of the two statutes. *See North Haven*, 102 S. Ct. at 1922 ("For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.").

Thus, in examining the legislative history of Section 504 to determine its jurisdictional scope, the court of appeals failed to give due weight to the legislative history

of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et. seq.* (Title VI), as the source of the meaning and scope of Section 504 at the time it was enacted. Consequently, it misconstrued the legal effect of the 1978 amendments to the Rehabilitation Act as narrowing the scope of Section 504, when in fact its scope remained unchanged. Instead, the effect of the 1978 amendments to the Rehabilitation Act was to codify existing administrative regulations which made available the "remedies, procedures and rights" of Title VI. See pp. 20-24, *infra*.

As recognized by the Third Circuit, both Title IX and Section 504 were modeled after Title VI and broadly describe the benefited classes. Unlike Section 504 at the time of its enactment, both Title VI and Title IX adopted an administrative scheme for terminating federal assistance "in the particular program, or part thereof" in which discrimination of intended beneficiaries by the recipient is found. The significant difference between Title IX and Title VI, however, is the omission from Title IX of the following language found in Section 604 of Title VI, 42 U.S.C. § 2000d-3 (hereafter "Section 604" language):

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.* (Emphasis added.)

In *North Haven*, this Court concluded that the deletion of the Section 604 language in the Conference Committee when Title IX was being considered, in conjunction with its analysis of other legislative history, verified that Section 901 of Title IX prohibited gender discrimination in employment. 102 S. Ct. 1919-1923. For reasons set forth below, however, the Court's conclusions regarding the broad applicability of Title IX to employment are not applicable to Section 504.

Although the legislative history associated with Title IX is limited, the legislative history associated with Section 504 is even more sparse. In determining that Section 504 at its inception applied broadly to employment practices, the Third Circuit relied on general expressions of Congressional concern over discrimination against the handicapped in employment and the need to encourage employment opportunities for the handicapped. But what the appellate court failed to recognize is that general references to employment in the legislative history do not diminish the established scope of Section 504, as derived from Title VI, and the plain meaning of the Section 604 language, that Section 504 does not apply to employment unless the employee-plaintiff is an intended beneficiary of the financial assistance. Indeed, none of the legislative history relied on by the court below demonstrates an intent of Congress to expand the scope of Section 504 beyond specific programs receiving federal assistance. Instead, this legislative history should be read merely as statements of philosophy and policy in the context of the millions of dollars being allocated to improve the circumstances of the handicapped.

Section 504 was added to the Rehabilitation Act because of the failure of Congress to enact amendments to Title VI proposed by Congressman Vanik and Senator Humphrey that would have added coverage for the handicapped.[3] The purpose of the rejected Title VI amendments was to cover education and vocational training[4] and both sponsors indicated their satisfaction that Section 504 incorporated their proposals.[5] Accordingly, at the

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[3] *See* H.R. 12,154, 92d Cong., 1st Sess. (1971); H.R. Rep. 13,947, 92d Cong., 2d Sess. (1971); 118 Cong. Rec. 32,310 (1973) (remarks of Sen. Humphrey).

[4] 117 Cong. Rec. 45,974 (1971) (remarks of Rep. Vanik).

[5] 119 Cong. Rec. 18,137 (1973) (remarks of Rep. Vanik). *See also* prepared statement of Senator Humphrey, 118 Cong. Rec. 32,310 (1973) stating that both Section 503 and Section 504 carry through the intent of original bills which he had "introduced . . . this year

time of enactment of Section 504, Title VI, not Title IX, established the scope of Section 504. Indeed, Congressman Vanik's and Senator Humphrey's proposals to amend Title VI preceded the consideration and enactment of Title IX. Thus, the Seventh Circuit in *Simpson* found that "the different language . . . and the different legislative history of Title IX demonstrate more clearly than does the language and legislative history of Section 504 exactly who are the beneficiaries of Title IX protection" and that Title VI case authority is more compelling in determining Section 504's scope. 629 F.2d at 1236 (footnote omitted). The conclusion that Section 601 of Title VI serves as the source of meaning of Section 504 is reinforced by Congress' 1978 amendments to the Rehabilitation Act making the "remedies, procedures and rights" of Title VI applicable to Section 504.

B. The Legislative History of Section 601 of Title VI, From Which Section 504 Was Derived, Shows That Even Without Section 604's Language Limiting the Employment-Related Scope of Title VI, Section 601 Did Not Encompass Employees Unless They Were the Intended Beneficiaries of Financial Assistance.

As recognized by the Third Circuit, Section 504 was modeled after Title VI and uses nearly the same words to describe its scope. Because the words used in Section 504 are derived from Section 601 of Title VI, their meaning as reflected in Title VI's legislative history is relevant in determining the scope and meaning of Section 504 at the time it was enacted.

In the original Administration bill proposing the Civil Rights Act of 1963, Section 601 of Title VI included a provision prohibiting employment discrimination in pro-

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. . . to amend . . . Title VI and Title VII and the Civil Rights Act of 1964." Clearly, however, even under the broad interpretation of Section 504 by the Third Circuit, Section 504 can not be equated with amending Title VII because the scope of Title VII is not limited to those programs receiving federal financial assistance as is the case under Section 504.

grams receiving federal assistance.[6] Subsequently, during the summer of 1963, the Administration drafted a new version of the Civil Rights Act containing the language now found in Section 601, which did not expressly provide that Title VI extended to employment practices. All provisions relating to employment, however, were placed in an expanded Title VII.[7] *Even before Section 604 was added to Title VI*, both Houses of Congress and the Justice Department understood that this revision of Title VI was intended to confine its protection to beneficiaries of federal programs, but not those employed to provide those benefits.[8] Indeed, in a letter in response to a specific question on this point from Senator Cooper, Attorney General Robert Kennedy, the Administration's primary spokesman on the Civil Rights Act, stated:

> *Title VI is limited in application to instances of discrimination against the beneficiaries of Federal assistance programs as the language of section 601 clearly indicates.* Where, however, *employees* are the *intended beneficiaries* of a program, Title VI would apply. Thus, for example, creation of job opportunities is one of the major purposes of the accelerated public works program. Hence construction employees would be deemed beneficiaries of such a program

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[6] *See* S. 1731, 88th Cong., 1st Sess. (1963), *as reported in Cannon v. University of Chicago*, 441 U.S. 677, 693-94 n.14 (1979).

[7] *See* H.R. 7152, 88th Cong., 1st Sess. (1963).

[8] *See Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) at 331, 335 (remarks of Sen. Ervin); *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1964) (hereafter *House Judiciary Committee Hearings*) at 2685 (testimony of Attorney General Kennedy), 2774 (letter from Deputy Attorney General Katzenbach to Rep. Celler); *Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) (hereafter *House Rules Committee Hearings I*) at 141, 198, 200 (remarks of Rep. Celler); 228-230 (remarks of Rep. McCulloch); 110 Cong. Rec. 1518-19 (1964) (remarks of Rep. Celler); *id.* at 1602 (remarks of Rep. Mathias); and *id.* at 10,076 (letter from Attorney General Kennedy to Sen. Cooper).

> and section 602 would require the administering agency to take action to prohibit racial discrimination against them in such a program. On the other hand, the Agricultural Adjustment Act and acreage allotment payments under it is a commodity program having nothing to do with farm employment. Farm employees are not beneficiaries of that program, and section 602 would not authorize any action to require recipients of acreage allotments to refrain from racial discrimination in employment. (Emphasis added.)

110 Cong. Rec. 10,076 (1964).

Notwithstanding these clear and unequivocal statements of Administration representatives and other proponents of the Civil Rights Act that Title VI did not apply to employment except in the limited circumstance where employees are the *intended* beneficiaries of a program, at least one opponent of Title VI construed its words to include both employees as well as beneficiaries.[9] Thus, when the Senate began consideration of H.R. 7152 (which had passed the House of Representatives), in order to clarify the intended meaning of the House bill, the Dirksen-Mansfield substitute (which eventually became the Civil Rights Act of 1964) was offered to improve upon the draftsmanship of the House bill.[10] Consistent with the objectives of making "a number of points clearer and more specific" and "express[ing] in specific legislative language what always has been intended",[11] Section 604 was added. As noted by Senator Humphrey, the Senate floor leader for the Civil Rights Act: "We have made no changes of substance in title VI . . . . We have made several minor adjustments and, in addition, we have modified the language to make explicit the declared in-

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[9] *See House Rules Committee Hearings I* at 379-80 (remarks of Rep. Poff); 110 Cong. Rec. 2484-85 (1964) (remarks of Rep. Poff).

[10] 110 Cong. Rec. 12,707 (1964) (remarks of Sen. Humphrey).

[11] *Id.*

tention of this title." [12] With respect to the new Section 604, he stated that: "This provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title." [13]

Thus, Section 604 merely made clear what always had been intended by the words in Section 601 that "[n]o person . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [federally assisted] program or activity." That is, Section 601 covers intended beneficiaries under such programs but does not encompass persons employed in connection with such programs unless the primary purpose of the federal assistance is the creation of jobs. *See Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 257, 276 (2d Cir. 1981) *cert. denied*, 102 S. Ct. 1611 (1982).[14] The legislative history of Title VI clearly demonstrates, therefore, that the presence or absence of Section 604 in Title VI was superfluous in that it was added to spell out the original scope and meaning of Section 601.[15]

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[12] *Id.* at 12,714.

[13] *Id.* at 12,720. *See also Hearings on H. Res. 789 Before the House Committee on Rules*, 88th Cong., 2d Sess. (1964) (hereafter House Rules Committee Hearings II) at 6, 7 (testimony of Rep. Celler).

[14] *See Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235-36 n.17 (7th Cir. 1980); and *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980), and the Title VI legislative history cited therein. Both appeals courts found that the legislative history of Title VI lends strong support to the conclusion that Congress did not intend protection under Title VI to any person other than an intended beneficiary of federal financial assistance. *See also Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982); *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); and *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979).

[15] *See* p. 8 & n.8, *supra*.

Because the language defining the scope of Section 504 is derived from Section 601, the applicability of Section 504 to general employment practices at the time of its enactment was the same as that of Title VI, unless the legislative history of Title 504 shows a clear and unambiguous legislative intent to the contrary. Even though Section 504 at the time of enactment did not contain express language equivalent to Section 604, a review of Section 504's legislative history does not reveal any intent to change the meaning of the words in Section 601 which also define the jurisdictional scope of Section 504.

C. Section 504 is Program Specific and, Therefore, Protects Only the Intended Beneficiaries of Federal Funded Programs from Discrimination.

A handicapped individual has standing under Section 504 only if he can "show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981). "The receipt of federal financial assistance by a multiprogram entity, for specific application to certain programs or activities, does not, without more, bring all of those multiple programs or activities within the reach of Section 504." *Id.* at 767. In *Simpson*, the Seventh Circuit explained the reason for this conclusion:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminu-

> tion of the benefits he would otherwise receive from the program.

629 F.2d at 1232.[16]

The statute and its history support this view. First, the language of Section 504 itself limits its application to handicapped individuals "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination *under any program or activity receiving Federal financial assistance.*" 29 U.S.C. § 794 (emphasis added). Second, the legislative history of Section 504 when it was enacted makes clear that it was to have a program specific scope.[17] Third, Section 504 was derived from Section 601 of Title VI, and the legislative history of Title VI clearly demonstrates that it was program specific; that is, Title VI's provisions applied only to the program receiving the financial assistance. *See* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 50-54, 65-67 (1976).

During the debates on the 1964 Civil Rights Act, concern was continually expressed that Title VI would permit intervention into every aspect of the operations of recipients. In response to those concerns, Title VI was redrafted to make it program specific, and the floor statements in both Houses confirm this intent.[18] Moreover, in response to a request from Representative Celler, chair-

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[16] *See also Carmi*, 620 F.2d at 674; *Sabol v. Board of Education*, 510 F. Supp. 892, 895 (D.N.J. 1981); *Cain v. Archdiocese of Kansas City*, 508 F. Supp. 1021, 1025 (D. Kan. 1981); *Reynolds v. Ross*, 25 FEP Cases 462, 467 (N.D.N.Y. 1981); *Flora v. Moore*, 461 F. Supp. 1104, 1115-16 n.9 (N.D. Miss. 1978).

[17] *See, e.g.*, discussion of Section 504 at 118 Cong. Rec. 32,294 (Senate Report); *id.* at 32,307 (remarks of Sen. Stafford); *id.* at 32,310 (remarks of Sen. Humphrey).

[18] *See* 110 Cong. Rec. at 1518-19, 21 (remarks of Rep. Celler); *id.* at 1542 (remarks of Rep. Lindsay); *id.* at 1602 (remarks of Rep. Mathias); *id.* at 2480-81 (remarks of Rep. Ryan); *id.* at 6545 (remarks of Sen. Humphrey); and *id.* at 7060 (remarks of Sen. Pastore).

man of the House Judiciary Committee, concerning a list of programs and activities involving federal financial assistance within the scope of H.R. 7152 (which was later given greater specificity in section 601 of the Dirksen-Mansfield substitute), Deputy Attorney General Katzenbach stated:

> The impact of title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, title VI *will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply.*

House Judiciary Hearings at 2774. Furthermore, as the 1964 Civil Rights Act worked its way through the House and Senate, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in another. The Administration's cabinet-level representatives consistent answer was that it could not.[19]

A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program. The Senate floor leader for Title VI emphasized that "[p]articipation in one program would not justify the exaction of a non-discrimination assurance concerning some other pro-

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[19] *See, e.g., Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. 1543 (1963) (colloquy between Representative Meader and HEW Secretary Celebrezze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. 2766 (1963) (Attorney General Kennedy indicated that the termination of assistance be limited to the particular *program* and *location* where the discrimination exists).

gram." [20] Similarly, Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[21] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the so-called "pin-point" termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced." [22] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs.[23] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the Senate amendments to the bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law." [24]

This view of legislative history of Title VI has been affirmed by the courts. In *Bd. of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit held that programs could not be con-

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[20] 110 Cong. Rec. 7059 (1964) (remarks of Senator Pastore).

[21] *Id.* at 7067 (remarks of Senator Ribicoff).

[22] *Id.* at 12,689 (remarks of Senator Saltonstall).

[23] *Id.* at 12,714-15 (remarks of Senator Humphrey).

[24] House Rules Committee Hearings II at 6.

demned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *See also North Haven*, 102 S. Ct. at 1926 (Section 901 of Title IX held to be program-specific by the Court).

The legislative history and the decisions of the courts make clear, therefore, what is evident from the statutory language—federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". Furthermore, a remedy for the aggrieved is not available unless it is proven that the complainant participated in a program which received federal financial assistance and was the intended beneficiary of that assistance. *Carmi*, 620 F.2d at 674-75 & n.4. These Title VI standards apply to Section 504 because the source of its scope is Title VI as codified by the 1978 amendments to the Rehabilitation Act.[25] *Id.*; *Simpson*, 629 F.2d at 1234. Consequently, to have standing under Section 504, the plaintiff must plead and prove as a jurisdictional prerequisite that the particular activity he participated in received federal financial assistance and that he was the intended beneficiary of that assistance. *Id.* In the instant matter, the facts show that the petitioner was a recipient of federal assistance but do not show that the plaintiff participated in a program receiving such assistance or was an intended beneficiary of the federal grant.

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[25] As discussed in more detail below (see pp. 20-24), Congress in 1978 amended Section 504 by specifying that the "remedies, procedures and rights set forth in Title VI," including the Section 604 language, apply to Section 504. 92 Stat. 2982. By doing so, Congress was expressly reaffirming and codifying the existing scope of Section 504 with respect to employment discrimination; that is, it applies only to intended employee-beneficiaries of federal assistance.

II. SECTION 504 DOES NOT CREATE AN ADDITIONAL PRIVATE RIGHT OF ACTION BEYOND THE RIGHT TO SEEK JUDICIAL REVIEW OF AN ADVERSE AGENCY ACTION.

A. The Legislative History of the Rehabilitation Act of 1973 and Its Two Amendments Does Not Support an Implication of a Right of Action Under Section 504 for Private Individuals Against Recipients of Federal Funds Prior to an Administrative Determination.

The question of whether a statute creates a cause of action, expressly or by implication, is essentially a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979); *Cannon*, 441 U.S. at 688 (1979). "[T]he fact that a federal statute may have been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Cannon*, 441 U.S. at 688. Rather, as recognized in recent decisions of this Court, the central inquiry in such cases is whether it is clear that Congress intended to create the private remedy asserted. *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981); *cf. Cannon*, 441 U.S. at 731 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").

Section 504 as enacted in 1973 does not explicitly create a right for anyone to bring suit in federal court. Moreover, the only contemporaneous legislative history is one sentence which refers to the provision as a mere policy proclamation.[20] This characterization is not surpris-

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[20] S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, 2123, stated: "The bill further includes a provision proclaiming a *policy* of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." (Emphasis added.)

ing because the Rehabilitation Act of 1973 was not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped individuals—especially the severely handicapped—and developing new programs to assist in their assimilation into society. 118 Cong. Rec. 32,279 (remarks of Senator Cranston). It was enacted primarily to improve the states' delivery of vocational rehabilitation services to handicapped individuals.

In sum, Section 504 stood alone within the Rehabilitation Act of 1973, unaccompanied by any implementation provisions. No authority was delegated to any agency to promulgate or enforce regulations under the Act. These omissions are in contrast with the language of Section 503 of the Rehabilitation Act, which contained provisions mandating the promulgation of regulations and the establishment of a complaint procedure within the Department of Labor. 29 U.S.C. § 793. Thus, no private right of action can be inferred under Section 504, because no rights to administrative process or other action was evidenced by the statute.

1. *The 1974 Amendments.*

Notwithstanding this contemporaneous legislative history indicating that Section 504 was no more than a policy statement, numerous courts between 1973 and 1978 concluded that Section 504 authorizes a private right of action. All of the courts of appeals that reached this conclusion, including the Third Circuit, have based their decisions on the decision of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977).[27]

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[27] *See N.A.A.C.P. v. Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979); *Camenisch v. University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980), *vacated as moot*, 101 S. Ct. 1830 (1981); *Davis v. Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); and *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977).

In *Lloyd*, the court relied heavily on the legislative history of the 1974 amendments to the Rehabilitation Act, which amended the definition of "handicapped individual" but did not in any way modify Section 504. Although the Act was amended for this limited purpose, the report written to support overriding the presidential veto of the 1974 amendments included language which extended beyond the scope of the amendments and attempted to clarify Congress' intent in 1973 regarding Section 504. Specifically, the Senate Committee report stated that: (1) Section 504 was patterned after the nondiscrimination language pertaining to recipients of federal financial assistance in Section 601 of Title VI and Section 901 of Title IX; (2) although not specifically required by Section 504, regulations were to be promulgated; and (3) the enforcement provisions of Section 504 were to be patterned after the implementing regulations of Title VI, 45 C.F.R. Parts 80 and 81, and Title IX, 45 C.F.R. Part 86. S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974).

The appellate court in *Lloyd* interpreted this legislative history to mean that Section 504 "contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court. . . ." 548 F.2d at 1286. But the Seventh Circuit concluded that the plaintiff had a private right of action under the factual circumstance in *Lloyd* because:

> [S]till it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts.

Id. at 1286 (footnote omitted). Significantly, in *Simpson*, 629 F.2d at 1229, the Seventh Circuit pointed out that the assumption by other courts that it implied a private right of action under Section 504 in *Lloyd* "may reflect an oversimplified view of that case and ignores

the limitations there expressed." The appellate court reiterated that in *Lloyd* it had found a private right of action solely on the basis, that, unlike present circumstances, at the time of its decision there did not exist remedial administrative procedures under Section 504. *Id.* at 1230.

Thus, the Congressional intent that can be gleaned from the 1974 committee report at most shows that Congress intended the enforcement provision of Section 504 to be patterned after existing Title VI and Title IX regulations. There is no indication in the report that Congress assumed that Title VI created a private remedy. Nor is there evidence in the legislative history that any Member of Congress voted in favor of either the 1973 statute or the 1974 amendments in reliance of an understanding that Title VI provided a private remedy.[28]

Furthermore, a conclusion that there is a private right of action under Section 504 is not justified by the following sentence in the 1974 Senate report:

> This approach to implementation of section 504, which closely follows the models of Title VI and Title IX, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*

S. Rep. No. 93-1297 at 39-40 (emphasis added). The *Lloyd* court—the only court to construe this sentence—stated that this phrase "contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court . . . ." 548 F.2d at 1286. The entire passage from the Senate re-

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[28] This Court has never explicitly held that Title VI contemplates a private right of action and Amicus believes there is none for reasons well-stated in Justice White's dissenting opinion in *Cannon*, 441 U.S. at 718-31. (White, J. and Blackmun, J., dissenting); and separate opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 379 (1978) (separate opinion of White, J.).

port can be considered nothing more than a directive to the Department of Transportation (DOT) and other administrative agencies to enforce Section 504 as the Department of Health, Education, and Welfare (HEW), was already enforcing Title VI and Title IX. If DOT, for example, should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be not the recipient of federal funds, and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole. *See Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Although not explicitly authorized by Section 504 until the passage of the 1978 amendments to the Rehabilitation Act (discussed below), at least 15 federal agencies including DOT, 45 Fed. Reg. 31,442, have issued virtually identical Section 504 regulations. Consequently, as a result of Executive Order 11914, 41 Fed. Reg. 17,871, which authorized HEW to coordinate the implementation of Section 504 by all federal departments and agencies, there now exists a uniform regulatory framework for Section 504. (*See also* Executive Order 12250, 45 Fed. Reg. 72,995 (1980), giving coordination authority to the Department of Justice). There now being a consolidated enforcement program under Section 504, "the judicial remedy available must be limited to post-administration remedy judicial review." *Lloyd*, 548 F.2d at 1286 n.29.

2. *The 1978 Amendments.*

The legislative history of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 likewise confirms that alleged discriminatees may not enter federal court except to seek review

of adverse administrative action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* As with the original Act in 1973, the principal thrust of the 1978 amendments was to expand the vocational rehabilitation, research, training, and construction programs and, additionally, to create a permanent authorization of appropriations for the basic federal-state vocational rehabilitation program. 29 U.S.C. § 701. Unlike in 1974, some of the amendments affected Section 504.

Section 504 was amended to authorize agency heads to promulgate agency regulations. In this respect, Section 504 now parallels Section 503, as enacted in 1973, because both now require implementing regulations and administrative enforcement.[29] Congress also added a new Section 505, which explicitly grants a private right of action to alleged victims of handicap discrimination in federal employment under Title VII of the Civil Rights Act of 1964, but then rejects that approach for Section 504 complainants by specifying that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964" apply to Section 504 violations. By doing so, Congress was merely codifying the HEW regulation, 45 C.F.R. § 84.61, which made available to Section 504 complainants the "remedies, procedures and rights" of Title VI—which, again, do not provide for or contemplate a private cause of action for alleged victims of discrimination directly against alleged violators.[30]

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[29] Because Section 503 as enacted contained an administrative enforcement scheme, courts have viewed this express remedy as a strong indication that Congress did not intend to provide a private judicial remedy as well under Section 503. *See, e.g., Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 246 (1980).

[30] "Obviously, when Congress wished to provide a private . . . remedy [under the Rehabilitation Act], it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. In view of the express judicial remedy provided in Section 501 and the express administrative remedy provided in Section 504, "it is highly improbable that

That Section 505 authorizes discretionary awards of attorney's fees to the prevailing party, other than the United States "in any action or proceeding to enforce or charge a violation of" Section 504, does not indicate that Congress intended a private right of action. Rather, this provision applies to administrative proceedings pursuant to the incorporated Title VI regulations, together with the limited judicial review authorized by Title VI itself, 42 U.S.C. § 2000d-2. Like the portion of the legislative history of the 1974 amendments which was construed by the Seventh Circuit in *Lloyd*, these provisions of the 1978 amendments contemplate "judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286.[31]

Nothing in the legislative history of the 1978 amendments indicates otherwise. The floor statements of Senators Cranston,[32] Stafford[33] and Bayh,[34] the committee

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Congress absentmindedly forgot to mention an intended private action" for Section 504. *Transamerica*, 444 U.S. at 20, *citing Cannon*, 441 U.S. at 742 (Powell, J., dissenting).

This Court has refused to infer private rights of actions where administrative or like remedies are expressly available. *See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (1974). *See also Transamerica Mortgage Advisors*, 444 U.S. at 19 ("where a statute expressly provides a particlar remedy or remedies, a court must be chary of reading others into it.").

[31] *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) ("[I]t does not necessarily follow that the [attorney's fees] amendment is intended to authorize private individuals to file civil actions"); *Cf. Simpson*, 629 F.2d at 1243 ("We are left without any indication that, contemporaneous with its adoption of § 503, Congress intended to extend a private remedy").

[32] 124 Cong. Rec. S15590-91, 15593 (daily ed. September 20, 1978); *id.* at S19001 (daily ed. October 14, 1978).

[33] *Id.* at S18999-S19000 (daily ed. October 14, 1978).

[34] *Id.* at S15593 (daily ed. September 20, 1978). In all of the court cases relied on by Senator Bayh, none explicitly held that a

reports,[35] and the conference reports[36] indicate no more than that the amendments to Title V of the Rehabilitation Act contemplate a right to seek judicial review of administrative action.[37] Significantly, Senator Cranston clearly distinguished the provisions of the amendments applicable to Section 504 from those applicable to Section 501, which explicitly extended Title VII rights, remedies and exhaustion requirements to qualified federal employees who are victims of handicap discrimination.[38] Moreover, the House Conference Report, which accepted the Senate's proposals concerning attorney's fees and the applicability of Title VI rights, remedies and procedures to Section 504, also unequivocally differentiated between the private right of action available to federal employees and the procedures available to aggrieved handicapped under Section 504.[39] Given the proximity of Section 501 to Section 504, the conclusion is inescapable—Congress obviously knew how to create an independent judicial remedy for persons covered by Section 504, but failed to do

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private right of action was available under Title VI, and 42 U.S.C. § 1983 provided an alternative and express cause of action in those cases.

[35] S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

[36] H. Rep. No. 95-1780, Conf. Rep., 95th Cong., 2d Sess. (1978) *as reported in* 124 Cong. Rec. H 12720 (daily ed. October 12, 1978).

[37] To the extent that the remarks of the three Senators seem to indicate that the 1978 attorney's fees provision reflects Congress' original intent that Section 504 included a private right of action, this Court placed little weight on such subsequent legislative history relating to the effect of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, on a similar right under Title IX. *Cannon*, 441 U.S. at 686 n.7. *See also Southeastern Community College*, 442 U.S. at 411 n.11. It is significant to note, moreover, that, unlike Title IX, Section 504 did not contain a provision for the award of attorney's fees contemporaneous with passage of the Act. *See Cannon*, 441 U.S. at 699 & n.25.

[38] *Compare* 124 Cong. Rec. S15591 *with* S15593 (daily ed. September 20, 1978).

[39] 124 Cong. Rec. H12720 (daily ed. October 12, 1978).

so, just as it has so often in the past rejected similar proposals in the form of amendments to Title VII. See Appendix A. *See Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977).

In sum, there is no evidence whatsoever in Section 504's history of a Congressional intent to provide for the type of private suit occurring in this case. Congress intended to foreclose private litigation about alleged handicap discrimination by recipients of federal financial assistance until a final agency determination has been made. Congress is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers" [40] contained in Title VI and incorporated by reference into Section 504 This Court has never demanded that Congress insert into a statute or its legislative history a sentence to the effect that "no court shall imply any additional remedies hereunder" as precondition to its refusal to "expand the coverage of the statute to subsume other remedies." [41]

B. Implication of a Private Right of Action Under Section 504 Would Interfere With the Legislative Purpose of the Rehabilitation Act.

It is important to view Section 504 within "the context of the entire legislative scheme" [42] of the Rehabilitation Act of 1973, as amended. As previously noted, as enacted in 1973, the purpose of the Rehabilitation Act was to provide massive appropriations to improve the delivery of vocational rehabilitation services. In contrast to the legislative histories associated with Titles VI and

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[40] *See Brown v. GSA*, 425 U.S. 820, 833 (1976).

[41] *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[42] *Morris v. Gressette*, 432 U.S. 491, 501 (1977), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

IX, there were no legislative findings regarding discrimination with respect to the handicapped. Although not specifically required by the Act, an administrative enforcement mechanism was established, which was codified by the 1978 amendments. Thus, in 1978 the primary jurisdiction over enforcement of Section 504 was committed, not to the courts, but to federal agencies which Congress presumed had developed the expertise to prevent discrimination against qualified handicapped persons.

Clearly, the legislative purpose of Section 504 is better served by agency enforcement, and judicial review of agency action, than by private suits. Unlike race, color, national origin, or sex discrimination, which are addressed in Title VI and Title IX, "handicapped discrimination" is not susceptible to precise categorization. It is different in kind and does not necessarily have the same effect on equal opportunity as with other forms of discrimination. *See* 41 Fed. Reg. 20,296 (1976) (Letter of HEW Secretary Mathews accompanying the publication of the initial proposed Section 504 regulations of HEW). Thus, determinations of handicap discrimination involve the resolution of two significant threshold issues not present in resolving discrimination complaints under Title VI and Title IX: (1) the determination of who meets the statutory definition of a "handicapped individual," [43] and (2) the determination of when equal treatment violates the statute. Because the answers to these questions are novel and complex, judicial implication of a private right to sue under Section 504 would defeat the legislative purpose that before federal courts become involved, the administrative agencies should be given an opportunity to apply their expertise to these issues in the context of remedying handicapped discrimination in programs for which they provide financial assistance. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-68 (1947). This is no simple task.

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[43] See Appendix B.

While there may be no difficulty in determining if a person is a "handicapped individual" under the Act if their impairment involves, for example, blindness or a mobility handicap, less disabling impairments present problems in terms of whether the statutory definition of "handicapped individual" is met. *See E. E. Black v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980) (lower back condition).[44] Likewise, the problems involving application of the statute to "handicapped individuals" are equally difficult, requiring an administrative assessment before judicial review. *See Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982) (controlled versus uncontrolled diabetes). Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. Nor is there a class of nonhandicapped persons with whom treatment of handicapped persons can be compared. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 706(7), is so broad that allegations of discrimination could not be restricted to readily identifiable classes of persons but undoubtedly would encourage complaints based upon disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

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[44] Moreover, administrators and judges have been struggling for years with definitions of disability in cases arising under the Social Security Act. The extreme difficulty in determining who is disabled, and to what extent, are illustrated by the conflicting medical testimony in a myraid of cases involving disability benefits, personal injuries, and workmen's compensation. *See, e.g., LeMaster v. Weinberger*, 533 F.2d 337 (6th Cir. 1976) (conflicting testimony as to whether claimant had or was disabled by multiple sclerosis); *see also*, Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 Harv. L. Rev. 833 (1976).

Although Congress chose to use the same term "discrimination"—as is found in Title VI and Title IX, Congress showed its caution by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap. Furthermore, Congress has consistently rejected attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground of discrimination. See Appendix A. Significantly, by incorporating the procedures and remedies of Title VI, with their explicit exclusion of employment practices from coverage except for federally subsidized jobs programs, Congress has shown in particular that it did not want employment discrimination lawsuits to arise under Section 504.[45] In addition, the courts have been particularly adverse to implication of private judicial remedies in matters involving employment practices under federal statutes and executive orders.[46] Judicially created employment litigation under the Rehabilitation Act would present, in the words of the courts in *Lloyd*, "the unseemly vista of a spotty application of ad hoc remedies in lawsuits in various regions of the country." 548 F.2d at 1286. In view of the cautious approach of Congress in this new area, and because Congress chose to establish an administrative scheme for handling these claims, rather than to provide for private causes of action, this Court should not create a direct judicial forum for resolving these complicated problems.

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[45] *See Trageser*, 590 F.2d at 89; *Simpson*, 629 F.2d at 1234-35.

[46] *See, e.g.*, the cases collected in *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. at 202 n.1.

III. A PLAINTIFF-EMPLOYEE HAS NO STANDING TO SUE UNDER SECTION 504 UNLESS HE IS AN INTENDED BENEFICIARY OF OR A PARTICIPANT IN A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE AND HAS EXHAUSTED AVAILABLE ADMINISTRATIVE REMEDIES.

If a private right of action can be implied under 504, to have standing to sue a plaintiff-employee must be an intended beneficiary of financial assistance. As discussed in detail above (see pp. 3-15, *supra*), the language of the statute and its legislative history support this limitation on a right of action under Section 504.

It is well-established, moreover, that a suit may not be brought under Title VI—the statute which determines the rights and remedies under Section 504—without exhausting administrative remedies under 42 U.S.C. § 2000d-2. *See Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).[47] The Title VI exhaustion requirement applies both to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School District of City of Saginaw, Michigan v. HEW*, 431 F. Supp. 147 (E.D. Mich. 1977). Under Section 504, exhaustion has been required before seeking court review. *See, e.g., Neal v. U.S. Postal Service*, 468 F. Supp. 958 (D. Utah 1979); *Doe v. New York University*, 442 F. Supp. 522, 523 (S.D.N.Y. 1978); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978).

Furthermore, the complainant must fully exhaust administrative remedies It is not sufficient that a complaint has been filed with the administrative agency. *See*

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[47] *See also Cave v. Beame*, 433 F. Supp. 172 (E.D. N.Y. 1977); *Johnson v. County of Chester*, 413 F. Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green v. Cauthen*, 379 F. Supp. 361, 378 (D. S.C. 1974); *Feliciana v. Romney*, 363 F. Supp. 656, 672-73 (S.D. N.Y. 1973); *Dupree v. City of Chattanooga*, 362 F. Supp. 1136, 1141-42 (E.D. Tenn. 1973).

Aircraft & Diesel Equipment Corp., 331 U.S. at 767-78 (1974).[48] Moreover, courts should be, and have been, reluctant to find relatively new administrative machinery insufficient before it has had a chance to prove its adequacy. *See Doe v. New York University*, 442 F. Supp. at 523; *Rogers v. Frito-Lay*, 433 F. Supp. at 203.

The need for agency investigation and determination is compelling in the field of handicap discrimination under Section 504 of the Rehabilitation Act. As former HEW Secretary Matthews stressed, handicap discrimination is "far more complex" than the discrimination prohibited by Title VI and Title IX.[49] As an agency which has had substantial experience administering programs for the rehabilitation of handicapped individuals, DOT is better equipped than the federal courts to make the initial investigation of complex factual situations and to formulate a consistent approach to handicap discrimination problems. Thus, exhaustion of administrative remedies should be required under Section 504 as well, with judicial review limited to such questions as whether DOT exceeded its statutory authority or abused its discretion.[50]

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[48] These policies were further explained and summarized in *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *McGee v. United States*, 402 U.S. 479, 484-85 (1971); *McKart v. United States*, 395 U.S. 185 (1969).

[49] 41 Fed. Reg. at 20,296.

[50] Alternatively, the complainant should be required to pursue his claims with DOT pursuant to the doctrine of primary jurisdiction. *See Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). *See also* Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964); *Federal Maritime Board v. Ibrandtsen*, 356 U.S. 481, 498-99 (1958); *United States v. Philadelphia National Bank*, 374 U.S. 321, 353 (1963).

CONCLUSION

The decision of the court of appeals should be reversed and this Court's opinion should make it clear that: (1) Section 504 does not give rise to a private right of action; and (2) Section 504 requires an otherwise qualified handicapped, plaintiff-employee to be an intended beneficiary of federal financial assistance and to have exhausted administrative remedies to have standing.

Respectfully submitted,

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APPENDIX A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964 to Add Handicapps a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	Sponsor
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	Sponsor
S. 1811	Pell
S. 1787	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4824	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1979-80)

Bill	Sponsor
S. 446	Harrison & 24 others
H.R. 393	Guyer
H.R. 609	O'Brien
H.R. 1326	Conte
H.R. 3345	Moakley
H.R. 5510	Guarni

97th Congress (1981-82)

Bill	Sponsor
H.R. 255	Guyer
H.R. 1919	Moakley

APPENDIX B

DEFINITION OF HANDICAPPED INDIVIDUALS

(7) (A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of [Sections 503 and 504], any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) as regarded as having such an impairment. For purposes of Sections [503] and [504] of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706(7), *as amended* by the Rehabilitation Amendments of 1974, Pub. L. No. 93-5126, § 111(a), 88 Stat. 1619, and *as amended* by the Rehabilitation, Comprehensive Services and Disabilities Amendments of 1978, Pub. L. 95-602, § 122(a), 92 Stat. 2984.